

Results of the September 13, 2017 WI/EPA Legal Authority Review Discussion

1. Path Forward for Issues WI/EPA Agreed on Prior to the Meeting:

a) Rule Packages 3 and 4 (21 issues):

Issues are resolved and EPA will transmit a letter confirming issue resolution to WDNR by late October, 2017.

b) Attorney General (AG) Issues 58, 59, 60, 64 and 75; Stormwater Issue 55; Issue 50 (Permit Termination):

Issues are resolved unless and until such time that an adverse court or other decision may require further WDNR action pertaining to the AG issues. EPA will transmit a letter confirming issue resolution to WDNR by late December, 2017.

c) AG Issue 19 (Aquatic Production):

EPA will complete its review of WDNR's statutory submission. If warranted and practicable, EPA is to include the issue's resolution in the December, 2017 letter discussed above. Also, EPA will review the broader statutory language, outside the WI LAR specific issue, after December, 2017. Questions raised by the broader review are to be resolved in the normal course of business.

d) Rule Package 5 (10 issues) and Issue 4 (Cooling Water Intake):

WDNR will keep EPA informed of the progress of the ongoing rulemaking and will provide a tentative Rule Package 5 timeline by October 30th. After Rule Package 5 is approved, WDNR will submit the rules for review, and EPA will check the rule language and confirm resolution of the corresponding issues.

WDNR will share drafts of Issue 4 rules and a proposed timeline for their finalization. EPA proposes that WDNR share this information by October 30th.

e) Stormwater Issues 23 and 26:

EPA and WDNR agree that issuing new general permits will resolve these issues. WDNR has shared one pre-public notice with EPA since the meeting, which EPA will provide comments on by COB October 20th.

WDNR will share the other pre-public notice draft permit as soon as possible and will inform EPA of the tentative timeline for doing so. EPA proposes that WDNR share the timeline by October 30th.

- f) Stormwater Issues 24, 25, and 52:

WDNR will initiate rulemaking on these Stormwater Issues. EPA proposes that WDNR provide a tentative timeline for the initiation of rulemaking by October 30th.

- g) EPA will appropriately update WI LAR status chart with latest status following issuance of each resolution letters anticipated in late October and late December.

2. Path Forward for Issues that Required Further Discussions at the Meeting:

- a. AG Issue 12 (Downstream Water Impacts):

EPA is open to modifying the WI/EPA Memorandum of Agreement (MOA) to ensure that Wisconsin incorporates downstream states' and tribes' water quality standards in permits in keeping with 40 C.F.R. 122.4(d). To initiate the MOA process, WDNR will draft MOA addendum language for EPA's consideration. EPA proposes that WDNR provide the language to EPA by December 30th.

- b. Issue 3 (Permit Modifications):

EPA agrees with WDNR that EPA's concerns regarding statutory judicial appeal -- based in Wis. Stat. § 283.6 -- are directly accounted for in Issue 5. Therefore, Issue 3 -- for which the central regulatory corrections have been made -- can be resolved because final resolution of Issue 5 will address the underlying statutory concern. Although not discussed in the meeting, EPA will include Issue 3, if practicable, in the December, 2017 resolution letter discussed above.

- c. Issue 69 (Emergency Exemption):

Pending language review, EPA is open to an MOA addendum limiting Wis. Stat. § 283.81's application to situations outside the Clean Waters Act's jurisdiction. To initiate the process, WDNR will draft MOA addendum language for EPA's consideration. EPA proposes that WDNR provide the language by December 30th.

- d. Stormwater Issues 53, 56, 57, and 67:

EPA considers these issues resolved based on WDNR's assurance that it will make the appropriate rule changes when the other stormwater rules --

see above Issues 24, 25, and 52 -- are opened for revision. Although, not discussed in the meeting, EPA will include these issues, if practicable, as part of the December, 2017 resolution letter discussed above.

Finally, regarding Issue 67, EPA agrees that the additional open records item raised for discussion--that originates from 40 C.F.R. § 122.34(d)(2) -- is resolved.

e. AG Issue 63 (False Statements):

WDNR is open to considering a reaffirmation of the AG's position of this issue, but only if EPA has a strong need for it. On September 28, 2017, WDNR provided EPA with a Court of Appeals case and an example of a false statements enforcement action to help inform EPA's interpretation of how this issue is likely to be addressed by Wisconsin courts and to illustrate Wisconsin's interpretation of its false statements statute. After EPA's review of this information, if practicable no later than December 30, 2017, WDNR and EPA will further discuss whether additional action is needed to resolve the issue.

f. AG Issue 5 (Judicial Review):

EPA and WDNR agree that a statutory correction is needed to resolve this issue. When available, WDNR will make available the draft statutory language proposed to address Issue 5 for EPA's review. If requested by WDNR, EPA will provide a letter in support of WDNR's efforts with the Wisconsin Legislature to obtain the needed statutory change.

3. Path Forward for New Issues Discussed at the Meeting:

EPA and WDNR agreed that new issues (with the exception noted below) will be held separate from the WI LAR and addressed in the ordinary course of business. Additional discussion of new issues will be delayed until January, 2018 to focus attention on resolving the currently active WI LAR issues. (Note: Wisconsin has a possible solution to share with EPA concerning the application requirements for sample collection.)

4. Path Forward for Future Rule Revisions:

WDNR will keep EPA informed of new rule packages coming out at the scoping statement phase and share draft scoping statements with EPA for review and comment. Similarly, EPA is to keep WDNR informed of new federal rulemaking.

5. Pathway Forward for a MOA Addendum Revision:

Both EPA and WDNR recognize that the existing draft of the MOA Addendum -- under consideration for some time -- now needs to have WI LAR items removed because they were addressed by other means. Additionally, the MOA Addendum will possibly need additions to resolve Issues 69 and 12. WDNR will initiate the process by drafting language for consideration on Issues 69 and 12 as discussed above. EPA and WDNR will discuss the timeline for the finalization of the Addendum.